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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 83-6567

JOHN D. ARNOLD, Petitioner,
versus,
STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A
TRUE COPY OF Brief of Respondent
HAS BEEN SERVED UPON OPPOSING COUNSEL BY
MAILING 3 COPIES IN AN ENVELOPE PROPERLY
ADDRESSED WITH POSTAGE PREPAID THIS 18th
DAY OF April, 1984
Harold M. Coombs, Jr.
ATTORNEY FOR Respondent
SWORN TO BEFORE ME THIS 18th DAY
OF April, 1984
James H. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86

QUESTIONS PRESENTED

I.

Should the Court grant the writ to determine if the Petitioner was denied the Sixth Amendment right to counsel at a jury view of the crime scene during his capital sentencing proceeding in light of this Court's holding that a jury view of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present and in light of the fact that trial counsel neither objected to the jury view arrangements nor requested that either they or Petitioner accompany the jury and trial judge to the crime scene?

II.

Should the Court grant the writ to review the factual determination by the South Carolina Supreme Court that a portion of the Solicitor's closing argument was simply an effort to explain the function of the jury after the case was remanded for retrial for sentencing and the Solicitor only argued to the jury the elements of kidnapping which the State had sought to prove?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 22027, filed January 17, 1984, as reproduced in Petitioner's Appendix at pages A-1 - A-12.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

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ARGUMENT

I.

The trial judge's conducting a jury view of the crime scene after discussing all arrangements with counsel in the presence of the Petitioner and after no objection to the arrangements was made at trial does not raise any constitutional issue for review by this Court.

Petitioner alleges error in the trial judge's conduct of a jury visit to the scene of the crime. The Transcript of Record before the South Carolina Supreme Court (Tr.) demonstrates that trial counsel initially proposed that counsel accompany the jury only for the purpose of insuring that no comments concerning the scene were made to the jury. When the trial judge assured counsel that he (trial judge) would personally "see that the jury is just allowed to see

the scene with no discussions," counsel explicitly consented to the arrangements. (Tr. p. 2143, line 16-p. 2145, line 7). Accordingly, the South Carolina Supreme Court has made the factual determination:

At no time did counsel for the appellants request permission to accompany the jury or to have the appellants do so. All arrangements for the jury view were thoroughly discussed with counsel in the presence of the defendants, and no hint of opposition on their part was expressed. State v. Plath, et al., Op. No. 22027, South Carolina Supreme Court, 1/17/84 (Petitioner's Appendix p. A-5).

Further, the court observed:

[C]ounsel for appellant Plath [had] requested that the next day's proceeding commence later than usual to enable him to consult with witnesses. This particular request was denied, yet the effect of the jury view without counsel for defendants created the delay they had actually sought. State v. Plath, et al., supra. (Petitioner's Appendix p. A-5).

"[A] jury ~~view~~ of the crime scene does not constitute part of a trial for purposes of a defendant's due process right to be present." State v. Plath, et al., supra, citing, Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934). While the use of counsel as showers at a jury view has its roots in ancient practice, there is no necessity for the presence of counsel where the entire jury view is under the direction of the trial judge in the absence of counsel. See Snyder v. Massachusetts, supra.

At common law a jury view is neither a trial nor any part of a trial, Snyder, 291 U.S. at 113, and no advantage nor prejudice may result from the absence of counsel at a bare viewing where no attention is directed toward any particular feature of a scene. See Snyder, 291 U.S. at 108.

[A] jury view of the scene is not a taking of testimony. Constitutional protections are not implicated or denied when, as here, the trial judge in fact accompanies the jury in the absence of defendants and their counsel, there having been neither an objection to the arrangement nor even a request to be taken along. State v. Plath, et al., supra. (Petitioner's Appendix A-6).

Petitioner seeks to have this Court review a complaint which was not made before the trial judge but which was fully considered for the first time on appeal by the South Carolina Supreme Court. The South Carolina Supreme Court's findings of the absence of an issue of constitutional dimension, no hint of opposition to the absence of counsel at the jury view when the arrangements were thoroughly discussed with counsel in the presence of Petitioner, and the absence of any demonstrable prejudice to Petitioner, in light of the facts and circumstances of the case, are separate and sufficient reasons why the writ of certiorari should be denied.

II.

The Solicitor's closing argument, as held by the South Carolina Supreme Court, did not mislead the jury or deprive the Petitioner of an independent determination on the aggravating circumstance of kidnapping.

Petitioner urges that the Solicitor's closing jury argument, during the retrial for sentencing proceeding, deprived Petitioner of the right to an independent determination of punishment. The basis for Petitioner's argument is his interpretation of an isolated portion of the Solicitor's argument; his interpretation has already been considered and rejected by the South Carolina Supreme Court.

Petitioner contended before the South Carolina Supreme Court, as he now contends, that the Solicitor argued to the second sentencing jury that the South Carolina Supreme Court, upon its mandatory review and subsequent reversal of the Petitioner's first capital sentencing proceeding, had approved the sufficiency of the State's evidence for the statutory aggravating circumstance of kidnapping. First, it should be noted that defense witnesses for both Petitioner and his codefendant, Plath, contributed testimony on direct examination which made it clear to the jury that the defendants had been incarcerated on death row. (Tr. p. 2212, line 15-p. 2213, line 5; p. 2216, lines 19-21; pp. 2338-2340). Thereafter, during closing argument, the Solicitor only defined kidnapping and gratuitously commented that such definition, not the sufficiency of the evidence,

had been approved by the South Carolina Supreme Court. (Tr. p. 2425, line 19-p. 2426, line 2). Within context of his argument, the Solicitor admitted that he had made an error in arguing to the prior jury and stated, entirely correctly, that the only thing before the present jury was to determine Petitioner's punishment. (Tr. p. 2425, lines 8-12).

Nothing in the present case either demeaned the jury's role in sentencing or urged them to follow the example of a prior jury. The South Carolina Supreme Court held that the Solicitor's argument was not susceptible to the interpretation that it was an effort to invoke a prior judicial decision to "preclude an independent jury determination on the aggravating circumstance of kidnapping." The South Carolina Supreme Court further held that the arguments were:

Simply efforts by the State to explain the function of the jury at this trial and to argue to the jury the elements of kidnapping which the State had sought to prove. We see no way in which the jury in this case could have been misled by these arguments, especially in light of the trial judge's ample instructions both in the course of voir dire and at the conclusion of the evidence. State v. Plath, et al., Op. No. 22027, South Carolina Supreme Court, 1/17/84 (Petitioner's Appendix, p. A-10).

The writ of certiorari should be denied since the question presented involves only a matter of interpreting the meaning of the Solicitor's closing argument and was fully resolved by the South Carolina Supreme Court in accordance with applicable constitutional considerations.

CONCLUSION

For the foregoing reasons, Respondent submits that
Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

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Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

April 18, 1984.